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**In the Supreme Court**  
**OF THE**  
**United States**

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OCTOBER TERM, 1961

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No. 611

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RAYMOND R. BEST and WALTER E.  
BECK,

*Petitioners,*

vs.

HUMBOLDT PLACER MINING COMPANY,  
and DEL DE ROSIER,

*Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit

**BRIEF FOR RESPONDENTS IN OPPOSITION**

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**OPINION BELOW**

The opinion of the Court of Appeals (Pet. App.  
A 20-29) is reported at 293 F.2d 553.

### **JURISDICTION**

The judgment of the Court of Appeals was entered on August 18, 1961 (Pet. App. B 30). No petition for rehearing was filed.

Petition for Writ of Certiorari was filed on December 15, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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### **QUESTIONS PRESENTED**

1. Whether the petitioners, as subordinate officers, where the United States has voluntarily submitted to the jurisdiction of a Federal Court by its complaint in eminent domain, can lawfully treat the District Court as a mere *forum non conveniens* and institute other *in rem* proceedings against respondents and yet bar respondents from operating their mines due to an outstanding writ of possession.
  2. Whether a plea of a burdensome trial in the District Court is sufficient to justify an additional *in rem* action as an administrative proceeding and deny respondents their right to a jury trial in evaluating their mining properties.
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### **STATUTES AND RULES INVOLVED**

40 U.S.C.A. 258a provides in pertinent part:

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States

for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. . . .

28 U.S.C.A. 1358 provides:

The district courts shall have original jurisdiction of all proceedings to condemn real estate for the use of the United States or its departments or agencies.

28 U.S.C. (Federal Rules of Civil Procedure), Rule 71A(i), provides:

At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

#### **STATEMENT**

Respondents herein, as plaintiffs, brought this action (R. 3-16) in Federal District Court to enjoin petitioners, who are subordinate officials of the Department of the Interior, from removing from the

jurisdiction of the District Court an *in rem* action in eminent domain and subject the mining properties of respondents to a "contest" before its Bureau of Land Management.

Respondents alleged in the District Court that they are the owners of thirteen placer mining locations, the location notices thereof being duly recorded in the Recorder's Office of the County of Trinity, State of California. Each mining location is alleged to include lands of established and known mineral character upon which—as to each separate claim—a discovery of valuable mineral; to wit: gold, has been made and the said claims and each of them have been and are held and worked by extensive excavations for their valuable gold content, and that the value is in excess of \$10,000.00.

It is further alleged that the petitioners herein, in proceeding through the medium of said contest, were acting in excess of their statutory authority therefor, and the respondents herein would be required to enter in upon prolonged and useless litigation and submit themselves to an unlawful exercise of attempted jurisdiction on the part of the petitioners.

It is further alleged that the United States, named as contestant in said contest, is the plaintiff in the eminent domain proceedings and has selected the United States District Court as the proper forum to determine all questions involved in said contest, and that the said petitioners were invoking the power and sovereignty of the United States of America without any warrant or authority of law.

It will be noted that, among the allegations in said contest (R-13), the petitioners claim that, so far as known to the contestant (United States), there are no proceedings pending before the Department of the Interior for the acquisition of title to or any interest in such lands on behalf of any party other than contestees (respondents herein).

The District Court, granted a temporary restraining order (R-17) on April 18, 1960, and on June 21, 1960 entered its order (R-17) vacating and dissolving the temporary restraining order, and that the complaint be dismissed. Thereafter and on June 11, 1960 the District Court entered its summary judgment of dismissal (R-22), stating therein that the purpose of the condemnation cases was to obtain immediate possession of the lands, and the Government has not raised therein the issue of the validity of the mining claims concerned.

#### ARGUMENT

The purpose of the eminent domain proceedings was to obtain, not only immediate possession of the lands, but to try the title to the premises of respondents. The error occurred in the summary judgment of the District Court (R-22) wherein, in Finding and Conclusion No. 4, the Court said:

"In the condemnation cases here involved, the purpose of the suit was to obtain immediate possession of the lands, and the Government has not raised therein the issue of validity of the mining claims concerned."

The Solicitor for the Department of the Interior, exercising his authority in accordance with law, did—as pointed out in the decision of the Court of Appeals, Appendix A, pages 20-29 (293 F.2d 553)—under date of June 5, 1957, in directing the United States Attorney General to institute these condemnation suits, state that the mining claims involved were invalid and thus put in issue in the District Court the question of the validity of the mining claims.

It will be noted in the decision of the Court of Appeals above referred to, that attention was called to the error of the District Court in stating that the issue of the validity of the mining claims was not raised in the condemnation proceedings.

None of the cases cited by petitioners support the claims of petitioners.

The Government itself, through its proper officers of the Department of the Interior, initiated the *in rem* proceedings in eminent domain in the District Court. In submitting itself to the jurisdiction of that Court for all purposes necessary to complete a determination of every question involved, it had submitted itself irrevocably to the jurisdiction of the District Court.<sup>1</sup>

The argument tendered by petitioners as reasons for granting the writ (Pet. 6) is entirely misplaced.

<sup>1</sup>*Jones v. Watts*, 142 F.2d 575, 577, 163 A.L.R. 240 (Cert. Den. 323 U.S. 787, 89 L.Ed. 628, 65 S.Ct. 310).

"It is well settled that when government invokes the aid of the court as a litigant it stands as any other litigant, with the same obligation to give effect to the rights of the person sued. It cannot ask the court to render a judgment or to enforce it without submitting itself to do justice."

See also *National Rag and Waste Co. v. U. S.*, 237 F.2d 846.

We submit the problem is not the overthrow of an administrative practice of many years' standing, but rather one that stops an attempted administrative procedure before it has an opportunity to take root. There is no authority under which an administrative board or bureau of limited authority, such as the Bureau of Land Management, can remove any part or parcel of an eminent domain proceeding from the Federal Court and take unto itself a piece of it for its own adjudication.

That this would be in violation of the Fifth Amendment is at once apparent.

By the institution of the action in eminent domain and the obtaining of a writ of possession, respondents have been deprived of their property pending adjudication of their rights by the Federal Court. Admittedly the Bureau of Land Management has no jurisdiction whatsoever over the writ of possession, so we have a split proceeding—partially in the Federal Court, partially in the Bureau of Land Management—and petitioners attempt to justify by some sort of legal legerdemain such a procedure (See e.g. *Phillips, et al. v. United States*, 243 F.2d 1). To respondents the theory is abhorrent to the established principles of justice under a constitution such as ours.

*U.S. v. O'Leary and Moore*, 63 I.D. 341, could not be authority for any points in this case. It was a contest of a mining location but there was no proceeding of any kind or character involving that mining claim pending before any Court. What was decided in that case was that hearings before the manager,

or any other officer, of the Land Department in mining cases was not authorized by law and that the Land Department would have to change its method of procedure by strained interpretation of some cases, particularly the *Cameron* case.<sup>2</sup>

However, that case would not be authority for the *O'Leary* case, nor would it be authority here. The *Cameron* case had to do with proceedings in a hearing before the register of the Land Office in which there was no objection made by the contestee. He participated in the hearing, carried his appeal all the way through to the Secretary, and the case was finally decided against him, holding his claim to be non-mineral in character. Thereafter, when the United States sought to oust him, he endeavored to hold to the property by raising the question of the character of the land. This Honorable Court decided that he had submitted himself to the jurisdiction of the Land Department and was bound by that administrative ruling.

There is no such parallel here.

Following the *O'Leary-Moore* decision by the Secretary of the Interior, the Department made an attempt to comply with the Administrative Procedure Act.<sup>3</sup> This act provides, among other things, that in case of an adjudication required by statute to be determined on the record after opportunity for an agency hearing, it must comply with the procedure laid

<sup>2</sup>*Cameron v. U. S.*, 252 U.S. 450.

<sup>3</sup>5 U.S.C. 1001 et seq.

out in Sec. 5 and, further, that no officer shall preside at the reception of evidence at hearings covered by Sec. 5a of the Act if such officer is responsible to or subject to the supervision or direction of any officer, employe or agent engaged in the performance of investigation or prosecuting functions for the agency.

Notwithstanding the ruling of the Secretary of the Interior, which was correct, that there was no statutory requirement for a hearing in contest cases involving the validity of a mining claim, the Department proceeded to create an office of Hearing Examiner. The Hearing Examiner is an employe of the Bureau of Land Management or the Department of the Interior and he is subject to the will of the Secretary, as any other employe. In a hearing such as petitioners would like to impose upon respondents herein, the person who signs the complaint in the contest is an employe of the Bureau of Land Management; the witnesses who testify for the Bureau are all employes; the prosecuting attorney for the Government is an assistant solicitor and his superior officer—the Solicitor for the Department of the Interior, is the final supreme court of that Department.

<sup>4</sup>Order No. 2509, 17 Fed. Reg. 6794, Sec. 23. Appeals in land cases.

"The Solicitor of the Department of the Interior may exercise all the authority of the Secretary of the Interior with respect to the disposition of appeals to the Secretary from decisions of the Director of the Bureau of Land Management (or his delegates), and from decisions of the Director of the Geological Survey (or his delegates), in proceedings which relate to lands or interests in lands."

Therefore, there is no basis for the contention of petitioners here that the Ninth Circuit's decision would impose upon the Government the dilemma of either foregoing immediate possession of land for public use or else abandoning the traditional and expeditious method of determining the validity of mining claims by the Department of the Interior. (Pet. 8)

In a sense it would be expeditious to use the method above described and thus exclude the Court. What would be a "burden" on the Court to determine the validity of the mining claims in the condemnation action—where the question belongs—would not exist in a hearing organized under the regulations above outlined. There the outcome is a foregone conclusion inasmuch as the Solicitor for the Department of the Interior has already alleged that the mining claims here are invalid, in his direction to the Attorney General to institute eminent domain proceedings.

A mining location, as long as it is a subsisting matter of record and until it has been proven of no value for its mineral content, is real property and an estate of inheritance.<sup>5</sup> Until the location is terminated by abandonment or forfeiture, it is property in the fullest sense of the word.<sup>6</sup>

<sup>5</sup>*Wilbur v. Krushnic*, 280 U.S. 306, 316, 74 L.Ed. 445, 449, 50 S.Ct. 103.

<sup>6</sup>*Forbes v. Gracey*, 94 U.S. 762, 767, 24 L.Ed. 313, 314; *Ehler v. Wood*, 208 U.S. 226, 52 L.Ed. 464, 28 S.Ct. 263; *Likes v. Virginia-Colorado Development Corp.*, 295 U.S. 639, 646, 79 L.Ed. 1627, 1630, 50 S.Ct. 889.

It will be noted that in the motion to dismiss, as well as in the summary judgment (R-21), there is no attack upon the validity of the locations, and the allegations of the bill admitted by the motion to dismiss dispose of any such contention.

The reasoning adopted by petitioners (Pet. 17) showing that there is a great burden laid upon the District Court by the Ninth Circuit Court's decision, apparently admits that there would be no such burden if the claims could be heard before the Hearing Examiner under the provisions above set forth. What difference would it make whether there was one claim or ten thousand claims? That would be no argument to take the statutory and constitutional jurisdiction of the Court from it and pass it over to the Bureau of Land Management. Obviously, if the respondents here could be accorded the same fair trial in the Bureau of Land Management hearing as in the Court, there would be the same burden laid upon the Bureau of Land Management.

The fact that there are many property rights to be adjudicated in the large-scale reclamation works is not an argument to deny to these respondents the right to have their properties adjudicated by the Court and the value thereof by a jury.

Petitioners cite authority opposing waiver of rights by the United States (Pet. 9), *United States v. 23,970 Acres*.<sup>7</sup> This case involved a claim of "election of remedies" in taking over and revoking a lease of

<sup>7</sup>360 U.S. 328, 330, 3 L.Ed.2d 1275, 79 S.Ct. 1193

Government property where the District Court and the Seventh Circuit decided the Government had elected to abandon revocation of the lease and sue for possession. That has no bearing on this case whatsoever. We here are concerned with the matter of ownership of mining claims by location and the institution of a contest against the mining claimants by subordinate officers of the Government when the United States already has possession of the premises under eminent domain proceedings. In the above cited case the United States had full title to the land, subject only to the respondent's lease.

In taking up the claim of petitioners that the filing of the condemnation action did not constitute an irrevocable choice of forum (Pet. 13), the petitioners set up some rather strained contentions. We take up the authorities cited in the footnotes on that page in the petition as follows:

*Railroad Commission v. Pullman Co.*<sup>8</sup> was a case involving power and authority of the Railroad Commission of Texas, and case was remanded to District Court to retain bill pending settlement in state Court of Commission's authority.

The next is *Burford v. Sum Oil Co.*<sup>9</sup> involving a Texas statute providing for a uniform method of formation of policy regarding the oil industry. This Honorable Court held that the state Courts were adequate and upheld the District Court dismissal. Nothing in the decision could apply here.

<sup>8</sup>312 U.S. 496, 85 L.Ed. 971, 61 S.Ct. 643.

<sup>9</sup>319 U.S. 315, 87 L.Ed. 424, 63 S.Ct. 1098.

The next was *Louisiana Power & Light Co. v. City of Thibodaux*<sup>10</sup> and was an action whereby, in an eminent domain action, under state law the defendant removed the case to the United States District Court on the basis of diversity of citizenship. At a pre-trial conference, the District Judge, on his own motion, ordered a stay of proceedings until the Supreme Court of Louisiana had been afforded an opportunity to interpret the state law. Nothing therein contained could possibly affect this action.

*Texas, etc. Ry. v. American Tie Co.*<sup>11</sup> was an action for damages for refusal of the railroad to pick up ties. It was there held that the statute creating the Interstate Commerce Commission gave that Commission sole jurisdiction and the Courts did not have authority to proceed, as a primary matter.

In *U.S. v. Western Pacific R.R. Co.*<sup>12</sup> the same rule was laid down on the ground that the Interstate Commerce Commission had sole jurisdiction.

*Pennsylvania R. Co. v. U.S.*<sup>13</sup> was another case where the question of judicial review of an order of an Interstate Commerce Commission could be had.

On the next point, there is no matter herein that had to do with liens, leases, or reversions.

Reference in Pet. 14 to the following also shows the specious character of the argument presented in support of the petition:

<sup>10</sup>360 U.S. 25, 3 L.Ed.2d 1058, 79 S.Ct. 1070.

<sup>11</sup>234 U.S. 138, 58 L.Ed. 1255, 34 S.Ct. 885.

<sup>12</sup>352 U.S. 59, 64-65, 1 L.Ed.2d 126, 77 S.Ct. 161.

<sup>13</sup>363 U.S. 202, 4 L.Ed.2d 1165, 80 S.Ct. 1131.

*Far East Conference v. U.S.*<sup>14</sup> states that the Federal District Court could not pass on the merits of a suit under the Sherman Anti-Trust Act without there having been prior submission of the question to the Federal Maritime Board in accordance with the provisions of the Shipping Act.

*U.S. v. Western Pac. R.R. Co.*<sup>15</sup> came up on certiorari to Court of Claims. This Honorable Court ruled matter was within exclusive primary jurisdiction of Interstate Commerce Commission.

Continuing in the petition, the same line of argument is persisted in (Pet. 16) with the citation of *Macauley v. Waterman Steamship Corp.*<sup>16</sup> which was a case where the District Court dismissed the complaint, seeking to enjoin enforcement of a war contract, on the ground that the Tax Court, under the Renegotiation Act, had exclusive jurisdiction. This Honorable Court affirmed the action of the District Court.

Wholesale rejection and cancellation of the rights to public lands are the order of the day in the Department of the Interior, done without any authority and forcing rightful claimants to abandon their homes and possessions because they have no funds to carry the litigation into the Courts. In the State of California alone, thousands of small tract applications have been arbitrarily cancelled without any reason or cause for the cancellation being advanced by the Bureau of

<sup>14</sup>342 U.S. 570, 574-575, 96 L.Ed. 576, 72 S.Ct. 492

<sup>15</sup>352 U.S. 59, 64-65; 1 L.Ed.2d 126, 77 S.Ct. 161

<sup>16</sup>327 U.S. 540, 90 L.Ed. 839, 66 S.Ct. 712

Land Management. Each one of those several thousand persons was invited by the Bureau of Land Management to file his application for a small tract under the act<sup>17</sup> and paid the filing fee of \$10.00 and advance rental of \$15.00 on each application. Some of these applications were held as long as seven years without any action being had on them, until finally during the months of October and November of 1961 wholesale rejections and cancellations were sent out—not based upon any failure of the applicants to comply with the law and without any reason under the statute being advanced in support of the cancellations.

While it is true this matter is no more germane to the matter before the Court than the argument of petitioners, the statement is made merely to show that people here in the West are not inclined to submit to the Bureau of Land Management unless positively required by law so to do.

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### CONCLUSION

The petition for a writ of certiorari should be denied.

Dated, Sacramento, California,

January 2, 1961.

CHARLES L. GILMORE,

*Attorney for Respondents.*

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<sup>17</sup>Act of June 1, 1938, 52 Stat. 609, 43 U.S.C. 682 A-E.